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DKLS Construction Sdn Bhd v AmGeneral Insurance Bhd

B HIGH COURT (IPOH) — CIVIL APPEAL NO 12BNCVC-89–10 OF 2014
SM KOMATHY JC
23 OCTOBER 2015

C *Insurance — Contractor's all risks policy — Claims — Appellant purchased contractor's all risks insurance policy from respondent — Appellant brought action against respondent to claim under contractor's all risks insurance policy for theft occurred on construction site — Whether trial judge correct in finding that theft not covered by extended maintenance clause under policy — Whether appellant could canvassed its claim based on cl 1 of policy when it had based its case on extended maintenance period in court below — Whether burden of proof on appellant or respondent to show there was breach of policy condition*

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E The appellant, a construction company had purchased a contractor's all risk insurance policy ('the policy') from the respondent, an insurer for the purpose of covering the risks in the construction of 40 units of shop houses at Mukim Kota Star, Kedah. The policy covered various risks during the construction period from 15 October 2009–31 August 2011 and the maintenance period from 1 September 2011–28 February 2013 whereby an extended maintenance clause ('EMC') was included in the policy. Problem arose when the respondent refused to indemnify the appellant on a theft occurred on the construction site on 30 January 2012. Consequently, the appellant brought an action against the respondent to claim on the policy for the total sum of RM222,483. The action was dismissed by the trial court, hence the present appeal. It must be noted that at the trial stage, the basis of the appellant's claim was that the theft was covered by the EMC and that the EMC was ambiguous and ought to be construed in its favour based on the contra proferentum rule. Nevertheless, in the present appeal, the appellant relied on cl 1 of the policy and submitted that the trial judge had erred in holding that the appellant was not entitled to make a claim on the policy ('the first issue'). The appellant further claimed that the burden was on the respondent as the insurer to show that there was a breach of condition No 3 of the policy and not on the appellant as was held by the trial judge ('the second issue').

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Held, dismissing the appeal:

(1) The new arguments ie the first issue raised by the appellant were points not canvassed in the court below and no arguments were directed upon them as the appellant had based its case on the EMC. It was too late in the

day for the appellant to depart from its position and attempt to formulate its case based on cl 1 at this stage. The sessions judge was right in making a finding that the theft was not covered by the EMC (see para 11).

(2) It is clearly settled law that the burden of proof was on the respondent insurer to show there was breach of policy condition No 3. The learned sessions judge erred in putting the burden on the appellant. The respondent had therefore failed to prove that there was a breach of policy condition No 3. Nevertheless, in light of the court's decision on the first issue that the sessions judge was right in making a finding that theft was not covered by the EMC, the court dismissed the appeal although the appellant succeeded on the second issue (see paras 15 & 20–21).

[Bahasa Malaysia summary

Perayu, syarikat pembinaan telah membeli kesemua polisi insurans risiko kontraktor ('polisi') daripada responden, syarikat insurans bagi tujuan melindungi kesemua risiko di dalam pembinaan 40 unit rumah kedai di Mukim Kota Star, Kedah. Polisi tersebut melitupi pelbagai risiko semasa tempoh pembinaan dari 15 Oktober 2009–31 Ogos 2011 dan tempoh penyelengaraan dari 1 September 2011–28 Februari 2013 di mana klausa penyelenggaran tambahan ('KPT') dimasukkan di dalam polisi tersebut. Masalah berbangkit apabila responden menolak untuk membayar perayu atas kecurian yang berlaku di tapak pembinaan pada 30 Januari 2012. Akibatnya, perayu membawa tindakan ini terhadap responden untuk menuntut ke atas polisi tersebut bagi jumlah keseluruhan sebanyak RM222,483. Tindakan ditolak oleh mahkamah perbicaraan, maka rayuan ini. Ia mesti diambil perhatian bahawa pada peringkat perbicaraan, asas tuntutan perayu adalah kecurian dilindungi oleh KPT dan bahawa KPT tersebut adalah kabur dan patut ditafsirkan bagi memihaknya berdasarkan peraturan contra proferentum. Walau bagaimanapun, dalam rayuan ini, perayu bergantung ke atas klausa 1 polisi dan berhujah bahawa hakim perbicaraan telah tersilap dalam memutuskan bahawa perayu tidak berhak untuk membuat tuntutan atas polisi tersebut ('isu pertama'). Perayu selanjutnya menuntut bahawa beban adalah ke atas responden sebagai syarikat insurans untuk menunjukkan bahawa terdapat kemungkiran syarat No 3 polisi dan bukan ke atas perayu seperti yang diputuskan oleh hakim perbicaraan ('isu kedua').

Diputuskan, menolak rayuan:

(1) Hujahan baru iaitu isu pertama yang dibangkitkan oleh perayu adalah poin yang tidak dihujahkan di mahkamah bawahan dan tiada hujahan telah ditetapkan ke atasnya kerana perayu telah mendasarkan kesnya atas KPT. Adalah agak lewat bagi perayu untuk mematahkan daripada kedudukannya dan mencuba untuk merangkakan kesnya berdasarkan atas klausa 1 di peringkat ini. Hakim sesyen adalah betul dalam membuat

dapatan bahawa kecurian tidak dilindungi oleh KPT (lihat perenggan 11).

(2) Adalah jelas undang-undang yang ditetapkan bahawa beban pembuktian adalah ke atas responden syarikat insurans untuk menunjukkan terdapat kemungkiran syarat polisi No 3. Hakim sesyen yang bijaksana tersilap dalam meletakkan beban ke atas perayu. Responden oleh itu gagal untuk membuktikan bahawa terdapat kemungkiran syarat polisi No 3. Walau bagaimanapun, berdasarkan keputusan mahkamah atas isu pertama bahawa hakim sesyen adalah betul dalam membuat dapatan bahawa kecurian tidak dilindungi oleh KPT, mahkamah menolak rayuan walaupun perayu berjaya atas isu kedua (lihat perenggan 15 & 20–21).]

Notes

For a case on claims, see 8(1) *Mallal's Digest* (5th Ed, 2015) para 88.

Cases referred to

Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong [2008] 4 MLJ 672; [2008] 5 CLJ 93, FC (refd)

Bond Air Services Ltd v Hill [1955] 2 All ER 476, QBD (refd)

Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd [2005] 1 MLJ 373, HC (refd)

Fraser v B N Furman (Productions) Ltd (Miller Smith & Partners, third parties) [1967] 1 WLR 898, CA (refd)

MC Motor Cycle Supply Sdn Bhd v Berjaya General Insurance Bhd [2005] MLJU 385, HC (refd)

Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467; [2014] 6 CLJ 821, CA (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124 (refd)

W & J Lane v Spratt [1970] 1 All ER 162, QBD (refd)

Harbans Singh (Ramgit Singh with him) (Gurdev, Dalgit, Su & Co) for the appellant.

Wong Wai Leong (Lee Yen Yee with him) (Azim, Tunku Farik & Wong) for the respondent.

SM Komathy JC:

[1] The plaintiff brought an action to recover from the defendant, a sum of RM227,388.40 under a contract of insurance in respect of a theft that occurred at its premises. The sessions judge dismissed the claim and hence this appeal.

[2] The plaintiff is a construction company. On or around 2009, it was appointed as the main contractor by PKB-Semarak Daya Sdn Bhd

('PKB-Semarak Daya'), a developer, to construct 40 units of shop houses at Mukim Kota Star, Kedah.

[3] In connection with the construction project, PKB-Semarak Daya and the plaintiff purchased a contractor's all risk insurance policy ('the policy') with the defendant to cover various risks during the construction period from 15 October 2009–31 August 2011 and the maintenance period of 1 September 2011–28 February 2013. There was an extended maintenance clause ('EMC') in the policy, that was in these terms:

> it is agreed and understood that otherwise subject to the terms exclusions, provisions and conditions contained in the policy or endorsed thereon and subject to the Insured having paid the agreed extra premium, this insurance shall be extended for the maintenance period (SPECIFIED IN THE SCHEDULE) to cover loss of or the contract works caused to the Insured contractor(s) in the course of the operation carried out for the purpose of complying with the obligation under the maintenance provisions of the contract, occurring during the maintenance period provided such loss or damage was caused on the site during the construction period before the certificate of completion for the loss or damaged section was issued.

[4] On or about 19 March 2012, the plaintiff informed the defendant that a theft incident had occurred on 30 January 2012 at the project site and made a claim on the policy for the total sum of RM222,483. The defendant refused to indemnify the plaintiff on the ground that the theft had occurred during the maintenance period. It was said that cl 1 of the policy which covered the construction period could not consequently be relied upon. The EMC did not cover the theft. In this action, the plaintiff claimed that the refusal was wrongful and sought an indemnity under the policy.

[5] The trial proceeded only on the issue of liability as quantum was agreed by parties at RM181,110.72. The trial judge dismissed the plaintiff's case on two main grounds:

(a) the insurance coverage had expired when the theft occurred. The EMC was not ambiguous and it was clear that it did not cover the theft as the only risk it covered was the risk specifically mentioned therein. It excluded all the risks covered by cl 1; and

(b) that the plaintiff was in breach of condition 3 of the policy in not taking all reasonable precaution to prevent the theft.

[6] In her grounds of judgment, the sessions judge gave the following reasons as to why she found the plaintiff was a breach of cl 3:

> This court accepts defendants argument that the plaintiff should have recognised the danger of theft at the construction site and take sufficient precaution to prevent

theft. As propounded by the Court of Appeal in the case of *Devco Holder Ltd & Burrows & Paine Ltd v Legal & General Assurance Society Ltd* [1932] 2 Lloyd's LR 567, 'the insured should not deliberately court danger, the existence of which he recognises, by refraining from taking any measures to avert it'.

Failure on plaintiff's part to take steps to ensure security services being employed and sufficient lighting and proper fencing were done, this Court found that there was failure on plaintiff's part to observe the terms of the policy, in particular General Condition 3 that requires plaintiff to take all reasonable precautions to prevent loss, damage or liability as spelt out as follows:

> The due observance and fulfilment of the terms of this policy in so far as they relate to anything to be done or complied with by the insured ... shall be conditions precedent to any liability of the insurers.

[7] The plaintiff now takes both issues on appeal. On the first issue it was submitted that the learned sessions judge erred in holding that the plaintiff was not entitled to make a claim on the policy. It will be useful if I reproduce the relevant portions from the plaintiff's written submissions on this point.

(i) The learned Sessions Court judge failed to consider the relevant provision/clause listed as Section I in the Main Policy — Material Damage which reads:

> The Insurers hereby agree with the Insured that *if anytime during the Period of Cover* the items or any part thereof entered in the schedule, shall suffer any unforeseen and sudden physical loss or damage from any cause, other than those specifically excluded, in a manner necessitating repair or replacement, the Insurers will indemnify the Insured in respect of such loss or damage ...

(ii) The sessions judge had failed to consider that clause 1 stated *Period of Cover*. The *Period of Cover* stated in the schedule consisted of 2 periods: Construction Period (15-10-2009 to 31-8-2011) and Maintenance Period (1-9-2011 to 28-2-2013). As the defendant had not qualified the words '*Period of Cover*' by stating 'Construction Period of Cover', this indicated that it was intended to cover the relevant perils for the entire Period of Cover and not merely for the construction period only. If the insurer intended to cover the various perils only for the construction period, the defendant would have used the words 'Construction Period of Cover' in the clause instead of 'Period of Cover'.

(iii) Secondly, the said clause does not use the word 'ONLY'. So, it is wrong to read the word 'only' into the said clause as done by learned counsel for the Defendant so as to read that, it is the only risk covered during the maintenance period.

(iv) Thirdly, it is respectfully submitted that, what the said clause does, is it extends cover to an additional risk for the Maintenance Period after the Insured had paid the extra premium. It does not extinguish all the various perils covered under the Main Policy. After all, the Plaintiff paid extra

premium for additional coverage of risk and not to limit his coverage to just one specific risk only during the Maintenance Period. It is therefore clear that, the words 'this insurance shall be extended ...' are used by the insurer to provide cover for an additional risk.

(v) Fourthly, if there is any conflict between the construction of this Extended Maintenance Clause and the clause in the Main Policy under Section I, the clause under Section I should prevail as:

(i) this EMC is made subject to all the terms of the Main Policy i.e. the Main Policy is therefore left untouched and coverage for perils under the Main Policy would continue to exist and not cease; and

(ii) the contra proferentum rule should be applied against the insurer if there is any ambiguity.

(vi) Fifthly, it cannot be the object of the Developer and the contractor to cover themselves only for the construction period and not the maintenance period as well. Virtually all construction contracts have a 1 year maintenance period whereby the contractor would be required to do remedial works for any defects that might appear after construction to the buildings. The Developer and the contractor would certainly want to be covered (and not be left exposed) for the usual perils such as flooding, landslide, theft etc. during this 1 year maintenance period as well, before possession of the buildings is handed over to the buyers.

[8] In response, the defendant objected to the plaintiff relying on the arguments set out above on the ground that they were not part of the pleaded case of the plaintiff and were not canvassed before the trial judge. At the trial, the plaintiff had formulated its case on the basis that the theft was covered by the EMC, and in the alternative, the EMC was ambiguous and ought to be construed in its favour based on the contra proferentum rule.

[9] It is trite law that an appellant is precluded by law from raising a point in an appeal which was not pleaded or raised in evidence during trial. It would suffice to cite two cases that illustrate this rule. His Lordship Zulkefli Makinudin FCJ in his judgment in *Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong* [2008] 4 MLJ 672; [2008] 5 CLJ 93 held at para 18:

... This is because looking at the records of the proceedings in the courts below the subject matter of the complaint made by the defendants therein does not relate directly on the issue of statutory years of purchase, but more to the issue on the finding of facts made by the trial judge and the test to be applied in the case of contributory negligence in a motor accident claim. The issue on statutory years of purchase was never an issue to be decided before the trial judge. For this reason I am of the view this court and for that matter even the Court of Appeal which heard the appeal would have declined to answer this particular issue raised by learned counsel for the defendants. The point to be made here is that counsels acting for applicants in pursuing any matter further to the Superior Court should be diligent and

circumspect in ensuring only issues that had arisen at the hearing before the trial court be raised and not bringing in issues to be dealt with by the Superior Court through the backdoor way.

[10] In a similar vein, in *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467; [2014] 6 CLJ 821, the Court of Appeal at paras 32 and 33 observed:

> In our judgment the appellant is precluded from raising the locus standi point for the first time in this appeal. It is trite that an appellant is precluded by law in an appeal which has not being pleaded or raised in evidence during trial. It is well settled that the Court of Appeal will not, save in limited cases, entertain a point of law not taken at first instance or a point not canvassed in the court below as stated by Justice Gopal Sri Ram JCA (as he then was) in the case of *Hj Ali Hj Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310. The rationale for this ruling is quite obvious in that the issue not having been raised in the court below, was not challenged by the respondent nor considered and ruled upon by the trial.
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> The appellant did not include the lack of locus as a ground in its memorandum of appeal and neither did it apply to amend the memorandum of appeal and neither did it apply to amend the memorandum of appeal to do so. There is a plethora of weight decisions that an appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum of appeal as a matter of essential justice, that is justice to the court below and to the respondent who would have to defend a judgment of the High Court on an unpleaded ground of appeal ...

[11] Applying this rule to the new arguments raised by the plaintiff, it is clear that it precludes the plaintiff from doing so. These were points not canvassed in the court below and no arguments were directed upon them as the plaintiff had based its case on the EMC. It is too late in the day for the plaintiff to depart from its position and attempt to formulate its case based on cl 1 at this stage. In my view, the sessions judge was right in making a finding that the theft was not covered by the EMC.

[12] On the second issue, the plaintiff submitted that the burden is on the defendant as the insurer to show that there was a breach of condition 3 and not on the plaintiff as held by the sessions judge. She erred in putting the onus of proof on the plaintiff to show that guards were hired to patrol the worksite.

[13] The question of who bears the onus of establishing a breach of a condition was considered by the English Court of Appeal in *Bond Air Services Ltd v Hill* [1955] 2 All ER 476. In that case the claimant's plane was insured by the insurers and it was a condition precedent that the claimant/insured shall observe the statutory orders, regulations and directions relating to air navigation. The insurer contended that it was for the insured to show there was compliance with the above clause. The court held that the burden of proof of

breaches of condition was on the insurer. Lord Goddard CJ stated at p 479 as follows:

> That it is for the insurers who allege that the conditions were broken to prove it, has, I think, always been accepted, at least since PARKE, B's judgment in *Barrett v Jermy* (1) (3 Exch at p 542).
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> The respondent's contention, no doubt, is that, by providing that the observance of conditions is to be a condition precedent to his liability to pay, the policy has shifted the onus on to the claimants. It is enough to say that in this court *Stebbing v Liverpool & London & Globe Insurance Co, Ltd* (5) concludes the matter. In that case there were words to exactly the same effect as here, namely, that compliance with the conditions should be a condition precedent to any liability on the part of the insurer, and the court decided that the burden of proving the falsity of an answer which amounted to a breach of warranty was on the insurer.

[14] In *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124, the Supreme Court approved and applied the principle in *Bond Air Services Ltd*. It was held at p 126:

> We do not think the learned judge was wrong to say that the burden of proving the exception was on the appellant who was relying on the exception to escape liability. The learned judge used the two-pronged approach. First, he said that certain provisions of the policy were ambiguous, therefore, the contra proferentem rule must be invoked in construing the policy. secondly, if he was wrong, that is, if there is no ambiguity in the language of the policy, the appellant was still liable to indemnify the respondent. The reason is that the appellant relies on the assertion that the respondent has contravened Exception 6 of the policy. The burden of proof was on the appellant. The law has been stated quite clearly by Lord Goddard CJ in *Bond Air Services Limited v Hill* ...

[15] It is clearly settled law that the burden of proof is on the defendant insurer to show there was breach of policy condition No 3. The learned sessions judge erred in putting the burden on the plaintiff. To succeed under this clause the defendant must show that on the balance of probabilities the plaintiff failed to take reasonable steps to safeguard the construction site from loss and damage.

[16] Condition No 3 reads:

> The insured shall at his own expenses take all reasonable precautions and comply with all reasonable recommendations of the Insurance to prevent loss, damage or liability and comply with statutory requirements and manufacturers' recommendations.

[17] The locus classicus as to the meaning of this clause is the judgment of Lord Justice Diplock in *Fraser v B N Furman (Productions) Ltd (Miller Smith & Partners, third parties)* [1967] 1 WLR 898. The learned Lord Justice said:

> 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is inter alia to indemnify the insured against liability for his (the insured's) personal negligence ... ... What, in my judgment, is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken. On that construction of the condition, which seems to me to be implicit, though not expressly stated, in some obiter dicta of Lord Justice Goddard in *Woolfall & Rimmer v Moyle*, I next turn to the facts of this case ...

[18] The recklessness propounded by the House of Lords in *Fraser*'s case was also applied in *W & J Lane v Spratt* [1970] 1 All ER 162. Mr Justice Roskill (as he then was) said at p 171:

> I have to ask myself the same question as Diplock LJ asked. It is not enough that the employer's omission to take a particular precaution to avoid accident should be negligent. It must at least be reckless, that is to say, made —
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> > with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted.

[19] The recklessness test has been endorsed and applied in Malaysia in two cases, *Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd* [2005] 1 MLJ 373, and *MC Motor Cycle Supply Sdn Bhd v Berjaya General Insurance Bhd* [2005] MLJU 385. The authorities on the subject illustrate that it is not sufficient for the defendant to show that the plaintiff was negligent but necessary to show that the plaintiff was reckless.

[20] Thus, to show breach of policy condition No 3 by the plaintiff, the defendant must show affirmatively that the plaintiff was reckless ie the plaintiff in the circumstances recognised the danger of theft and did not care whether it was averted or not. In the instant appeal, the defendant alleged that no guards were hired to guard the construction site although theft at construction sites were rampant. The plaintiff lead evidence that the developer had hired four guards to patrol the site and produced the attendance sheets and the proof of payments made to the guards. As the plaintiff had given details of the four persons who were appointed as guards, in my view, it was incumbent on the defendant to establish that they were not hired by the plaintiff to patrol the site. This, the defendant failed to do although the burden lay on the defendant to

show that the plaintiff was reckless. In the circumstance, the sessions judge was wrong in holding that the burden was on the plaintiff to prove that the four guards were never hired to patrol the site. The defendant had therefore failed to prove that there was a breach of policy condition No 3.

[21] In light of my decision on the first issue, that the sessions judge was right in making a finding that theft was not covered by the EMC, the appeal is dismissed although the plaintiff succeeds on the second issue.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar